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No. 05-1284

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SUPREME COURT, U.S.

In the Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INC., A CORPORATION, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulations is a "person acting under a federal officer" for the purpose of 28 U.S.C. §1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a private entity subject to "detailed" and "comprehensive" federal regulation may, on that ground alone and pursuant to 28 U.S.C. §1442(a)(1), remove to federal court a lawsuit against it raising exclusively state law claims.

Amici States have a critical interest in this matter. State courts exercise general jurisdiction and are entrusted to resolve federal defenses like the preemption defense asserted by respondents here. By permitting private entities sued in state court to remove their suits to federal court solely because they are federally regulated and claim federal preemption, the Eighth Circuit upset the division of labor between state and federal courts. The Eighth Circuit's decision cannot be reconciled with the text of §1442(a)(1) and prior decisions of this Court, and offends settled principles of comity and federalism.

The Eighth Circuit's dramatic expansion of federal removal jurisdiction, moreover, threatens the States' fundamental interest in the enforcement of consumer protection acts and other state laws. Consumer fraud statutes, like the Arkansas law at issue here, depend upon judicial interpretation for their development. But federal court construction of state law is not binding on state courts, and state law claims removed to federal court deprive state courts of the chance to develop state law and clarify its requirements. In addition, federal courts are openly hesitant to develop the contours of state law without clear guidance from state courts. Finally, even if plaintiffs succeed in remanding some cases to state court, removals encouraged by the Eighth Circuit's rule will add needlessly to the time and expense of litigating important, public law claims.

STATEMENT

1. Petitioners Lisa Watson and Loretta Lawson, on behalf of a putative class of Arkansas cigarette smokers, filed suit

against respondents in Arkansas state court. Pet. App. 20a, 23a. The suit alleged that respondents violated the Arkansas Deceptive Trade Practices Act by misleadingly marketing certain brands as "light" cigarettes with less tar and nicotine. *Id.* at 63a-66a, 68a-72a. Petitioners further claimed that respondents engineered these brands so that the machines used to test their tar and nicotine content would register lower levels than smokers actually received. *Id.* at 63a-65a, 69a-70a.

2. Respondents removed the lawsuit to federal district court, invoking 28 U.S.C. §1442(a)(1), which authorizes removal by a federal officer or "any person acting under" an officer who is "sued in an official or individual capacity for any act under color of such office." Pet. App. 74a. Respondents claimed that they were "acting under" a federal officer within the meaning of §1442(a)(1) because the Federal Trade Commission ("FTC") "has extensive authority to monitor and regulate virtually all aspects of cigarette advertising" and requires respondents to employ the mechanical testing method whose results petitioners challenge as misleading. Pet. App. 76a, 78a.

The district court denied petitioners' motion to remand the suit to state court. Pet. App. 20a. The court identified four requirements for removal under §1442(a)(1): (1) respondents "must have acted under the direction of a federal officer"; (2) they must "raise a 'colorable' federal defense to [petitioners'] claims"; (3) they must show "a causal nexus between [these] claims and the acts [respondents] performed under color of federal office"; and (4) they must be "persons" for purposes of the statute. Pet. App. 35a. The district court disagreed with petitioners' contention that respondents failed to satisfy two of these elements—the need to "act[] at the direction of a federal officer," and the need for "a causal nexis" between petitioners' claims and actions respondents took under federal direction. *Id.* at 35a-36a.

As to the first, the district court held that respondents "acted under" the FTC because the agency has regulated "cigarette testing and advertising" for "over forty years" with "detailed and specific" requirements. Pet. App. 41a. The court cited a 1970 letter agreement, entered into in lieu of formal FTC regulation, in which cigarette manufacturers agreed to disclose tar and nicotine levels in all of their advertising. *Id.* at 25a-26a, 41a. The court also relied on the fact that the FTC itself performed the tar and nicotine tests for many years, and that it retains the power to oversee and monitor private testing, which continues to follow the FTC's prescribed methodology, the Cambridge Filter Method. *Id.* at 27a, 41a-42a. Finally, the court relied on a collection of FTC actions against individual companies and a 1978 advisory opinion as evidence that, in the FTC's view, conduct "contrary to the 1970 [letter] agreement and advertising inconsistent with" the FTC's prescribed testing methods was "deceptive advertising in violation" of federal law. *Id.* at 42a.

Turning to causation, the district court found a sufficient nexus between petitioners' claim that respondents had manipulated their product to fool the FTC's testing method and the agency's demand that companies use the results of that method in their advertising. Pet. App. 42a-43a. The court deemed it material that the FTC is aware that the Cambridge Filter Method permits "the very inaccuracies" that petitioners allege in their complaint, yet continues to require testing under that method. *Id.* at 43a.

3. The district court certified its order for interlocutory appeal, Pet. App. 59a-60a, and the Eighth Circuit affirmed. The court determined that respondents operated under sufficiently "comprehensive, detailed [FTC] regulation" to be "acting under" federal authority for purposes of §1442(a)(1). Pet. App. 8a. Like the district court, the court of appeals cited the FTC's requirement that companies test tar and nicotine content using

the Cambridge Filter Method, and that the FTC formerly performed this test and that today's private testing remains subject to FTC inspection and verification. *Id.* at 3a, 8a-9a. And while recognizing that the 1970 letter agreement was voluntary on the part of participating manufacturers, *id.* at 9a, the court found the agreement sufficiently "coercive" because companies entered into it on the threat of more formal regulation, and also because companies that violate the agreement's terms risk FTC action for deceptive advertising. *Id.* at 10a-11a.

The Eighth Circuit further found the required "causal connection" between "the federal officer's direction and control" and "the acts challenged in the plaintiff's complaint." Pet. App. 14a. According to the court, because petitioners challenged respondents' advertising, "[i]t cannot seriously be argued that the FTC does not direct and control the advertising of cigarettes." *Ibid.* The court cited a 1971 consent order between the FTC and another cigarette manufacturer, American Brands, Inc., in which the agency indicated that it was misleading to advertise using terms like "low" or "reduced" without disclosing tar and nicotine levels as determined by the Cambridge Filter Method. *Id.* at 15a. The court found a sufficient nexus between these FTC requirements and petitioners' "claim that this grouping of test results and descriptors renders advertising deceptive." *Id.* at 16a.

Judge Gruender concurred and wrote separately "to emphasize that [the court's] decision * * * should not be construed as an invitation to every participant in a heavily regulated industry to" remove suits to federal court. Pet. App. 18a. In most cases, Judge Gruender wrote, "a contract, principal-agent relationship, or near-employee relationship with the government will be necessary." *Ibid.* The concurrence stressed that it is the "extraordinary" level of FTC control that makes this case different. *Ibid.*

SUMMARY OF ARGUMENT

In the decision below, the Eighth Circuit dramatically expanded removal jurisdiction under 28 U.S.C. §1442(a)(1). That provision permits private parties to remove suits to federal court only when they act on behalf of federal officers. The Eighth Circuit's rule, by contrast, authorizes removal by any private party subject to sufficiently "detailed" and "comprehensive" federal regulation.

For the reasons set forth by petitioner and the United States, the Eighth Circuit's interpretation of §1442(a)(1) cannot be reconciled with the text, structure, purposes, or history of the statute. And for the reasons set forth below, the Eighth Circuit's interpretation offends principles of comity and federalism. Federal courts "scrupulously confine their own jurisdiction" within statutory limits. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (internal quotations omitted). The Eighth Circuit's decision ignores this limitation on federal judicial power and erroneously authorizes defendants to remove a host of cases raising exclusively state law claims.

In addition, if allowed to stand, the Eighth Circuit's interpretation of §1442(a)(1) will undercut protections guaranteed by state law. The Eighth Circuit's rule channels a new class of lawsuits into federal court under a removal standard that is not only "somewhat amorphous" (in the district court's words, Pet. App. 41a), but also extremely permissive, considering the broad spectrum of activity governed by federal rules that are at least as "detailed" and "comprehensive" as the informal FTC directives that respondents invoked to justify removal. Because federal court interpretations of state law are not binding in state court, resolving state law disputes in the federal system—particularly disputes that hinge on novel or unresolved questions of state law—slows the development of state legal doctrine and could foster inconsistency. In addition,

federal courts are loathe to develop state law beyond the bounds effected by existing state court precedent. Suits removed to federal court are therefore less likely to afford citizens as much protection as would be available in state court.

Defendants in other industries subject to federal regulation have already invoked the Eighth Circuit's decision to remove state law claims to federal court. And even if such cases are ultimately remanded to state court, removal adds significantly to the time and expense of litigating state law claims. This wasteful collateral litigation is harmful in its own right, and by diminishing the prospective value of state law claims, it discourages would-be private plaintiffs, who play an important role in vindicating state law rights and deterring their violation.

Amici States respectfully urge this Court to reverse the Eight Circuit's judgment and hold that federal officer removal under §1442(a)(1) does not apply merely because a defendant operates pursuant to federal regulation, even the alleged "detailed, comprehensive" regulation of the type found by the Eighth Circuit here.

ARGUMENT

I. The Eighth Circuit's Interpretation Of Section 1442(a)(1) Upends Settled Principles Of Comity And Federalism.

States retain the power "to provide for the determination of controversies in their courts," and that power "may be restricted only by the action of Congress in conformity with the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941). Both Congress and this Court have appropriately cabined federal jurisdiction in line with this principle. The "dominant note" in successive congressional enactments regarding the scope of diversity jurisdiction has been "one of jealous restriction, of avoiding

offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (internal quotations omitted); see also *Shamrock Oil & Gas Corp.*, 313 U.S. at 108 ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal] legislation."). Likewise, this Court has admonished lower federal courts to "scrupulously confine [their] own jurisdiction to the precise limits which [the jurisdictional] statute has defined," with "[d]ue regard for the rightful independence of state governments." *Shamrock Oil & Gas Corp.*, 313 U.S. at 109 (internal quotations omitted).

Consistent with this restrictive notion of federal jurisdiction, the "well-pleaded complaint rule" limits federal question jurisdiction to cases where the federal question appears "on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Federal defenses, including preemption, do not give rise to federal jurisdiction "even if the [preemption] defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983); see also *Caterpillar Inc.*, 482 U.S. at 393. The well-pleaded complaint rule entrusts these potentially dispositive federal law disputes to state courts, consistent with the longstanding presumption that state courts are "competent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988); see also *Moore v. Sims*, 442 U.S. 415, 430 (1979) (noting that this Court has "repeatedly and emphatically rejected" the notion that "state courts [are] not competent to adjudicate federal constitutional claims"); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981)

("Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.").

Federal officer removal under 28 U.S.C. §1442(a)(1) is an exception to the well-pleaded complaint rule, for it applies even where the complaint does not raise any issue of federal law. But the Eighth Circuit's unduly broad interpretation of §1442(a)(1) allows the exception to swallow the rule. The well-pleaded complaint rule prevents "potentially serious federal-state conflicts," *Franchise Tax Bd.*, 463 U.S. at 10, by placing upon state courts the responsibility to adjudicate federal defenses to state law claims. Remarkably, the Eighth Circuit used the basis for respondents' preemption defense—compliance with federal regulation, Pet. App. 17a—as grounds for federal jurisdiction, precisely what the well-pleaded complaint rule prohibits. If being subject to federal regulation and being able to assert a federal preemption defense is sufficient to trigger federal officer removal jurisdiction, then the well-pleaded complaint rule will be substantially undermined.

It is for this reason that the Eighth Circuit's decision upsets the established division of labor between state and federal courts. Rather than limiting federal officer removal to private parties who act on behalf of the national government, as petitioners urge, the Eighth Circuit interpreted §1442(a)(1) to undo much of what settled law has done to preserve state court jurisdiction. Like every other grant of authority to the federal courts, removal jurisdiction implicates "the relation of the general government to the government of the States," *Tennessee v. Davis*, 100 U.S. 257, 260 (1879), and "carries significance for federal-state relations." *Arizona v. Manypenny*, 451 U.S. 232, 239 (1981); see also, *e.g.*, *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (Wilkinson, J.) (observing the "significant federalism concerns implicated by" "removal jurisdiction") (internal quotations omitted). Section 1442(a)(1) thus must be

construed "with the highest regard for" the "equality" between federal authority and the States' power "to make and enforce their own laws." *Colorado v. Symes*, 286 U.S. 510, 518 (1932). The Eighth Circuit's drastic expansion of federal officer removal jurisdiction, which views federal regulation alone as grounds for removal, cannot be reconciled with these principles.

II. The Eighth Circuit's Interpretation Of Section 1442(a)(1) Threatens To Undermine The Enforcement Of State Consumer Protection And Other Laws.

The Eighth Circuit's expansion of federal officer removal jurisdiction, if upheld, will have the adverse practical consequence of making it more difficult to enforce the full range of protections granted by state law. Deceptive trade laws, like the Arkansas law at issue here, are a case in point.

"All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, Unfair & Deceptive Acts & Practices § 1.1, at 1 (2001). These laws are an intended and necessary adjunct to regulatory action under federal law by the FTC. "The federal and state laws were meant to complement each other," and "the FTC urged states to adopt their own little FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 16 (2005).

State attorneys general and other state agencies can bring suit to enforce these statutes, National Consumer Law Center, *supra*, § 10.3.4, at 785, and nearly every jurisdiction authorizes private suits as well. *Id.* § 7.2.1, at 537-538. Each year, state attorneys general collectively file thousands of such suits, Pet.

Supp. App. 1a, which together with private actions play a critical role in combating consumer fraud nationwide. See Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 374 (1990) (state acts are "important litigation weapons in commercial and consumer disputes").

The Eighth Circuit's interpretation of §1442(a)(1), by permitting removal of state law actions simply because the defendants are subject to extensive federal regulation, threatens the enforcement of state consumer protection and other laws in at least three ways. First, a federal court's construction of state law is not binding on state courts, and removal of state law claims to federal court fosters inconsistent rulings and deprives state courts of the chance to develop state law. Second, federal courts are openly reluctant to develop the contours of state law broadly or to entertain untested legal theories, undercutting consumer and other protections offered by state law. Finally, the Eighth Circuit's decision has already inspired defendants in federally regulated industries to remove to federal court lawsuits raising only state law claims. Even if such cases are later remanded, defendants will have succeeded in bogging down state law litigation in costly and time-consuming collateral matters.

A. Removal Slows The Development Of State Law And Allows For Inconsistent Rulings.

"[N]o matter how reasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast rather than a determination." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). Because a federal court's construction of state law does not bind state courts, federal decisions do not make that body of law any more certain or predictable. The Eighth Circuit's expansive take on

federal officer removal jurisdiction exacerbates this problem by rerouting many more cases from state to federal court.

The need for case-by-case development of state law is particularly acute when it comes to state deceptive trade laws. Like the Federal Trade Commission Act itself, those laws are typically drafted in general terms—"prohibiting all conduct that is 'unfair' or 'deceptive'"—and thereby afford courts "the power to make reasoned choices" on a case-by-case basis. Schwartz & Silverman, 54 U. Kan. L. Rev. at 3; see also *id.* at 15 ("Although these laws take various forms, each broadly prohibits unfair or deceptive acts, as does the FTC Act.").

These laws are general by design. As Congress recognized in passing the FTC Act, because "'it would undertake an endless task' by attempting to provide an exhaustive list of prohibited practices," it was necessary to draft the statutory text in broad terms. *Id.* at 9; see also *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1153-1154, 93 Cal. Rptr. 2d 439, 446 (2000) (noting that legislature used "sweeping language" in state unfair competition law "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur," and that the law was "intentionally framed in * * * broad, sweeping language * * * to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive") (internal quotations omitted). Practical realities make it "impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited," for "unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." *Id.* at 1154, 93 Cal. Rptr. 2d at 447 (internal quotations omitted); National Consumer Law Center, *supra*, § 1.1, at 1 ("Legislatures and courts have been careful to guarantee that [unfair or deceptive acts or practices] statutes are broad and flexible, so that they can apply to creative, new forms of abusive business schemes in almost all types of consumer

transactions."). Indeed, "[t]he broad, expansive, developing nature of [these] statues is their unique strength." National Consumer Law Center, *supra*, § 1.1, at 2.

Because "[w]hat constitutes an unfair trade practice is determined on a case-by-case basis," *Tyler v. Rapid Cash, LLC*, 930 So.2d 1135, 1140 (La. App. 2006), the development of consumer fraud law depends critically on the resolution of individual disputes. By expanding the range of cases subject to removal under §1442(a)(1), the Eighth Circuit's rule promises to deprive state courts of numerous opportunities to add depth and clarity to state law. Cf. *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 564-565 (2d Cir. 1978) (abstaining to allow Connecticut courts to resolve unsettled issues under state Unfair Trade Practices Act).

Moreover, because federal court interpretations of state law do not bind state courts, expanding removal jurisdiction increases the likelihood that courts will treat similarly situated parties differently. See *infra* pp. 13-17; cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam) (holding that federal court should abstain in favor of state court resolution because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource"); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (recognizing that allowing federal courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). "Needless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383

U.S. 715, 726 (1966) (footnote omitted). Far from assuring parties "a surer-footed reading of" state law, the Eighth Circuit's rule would remove a host of state law claims to federal courts, which do not have the power to render controlling pronouncements of state law.

In short, by permitting defendants to remove cases under §1442(a)(1) when they operate in any of the many spheres covered by "comprehensive" or "detailed" federal regulation, the Eighth Circuit's rule will deprive state courts of the opportunity to develop and clarify state law and will open the door to inconsistent decisionmaking.

B. Federal Courts Are Less Willing To Develop The Contours Of State Law.

The Eighth Circuit's rule also undermines the enforcement of state law because federal courts are less likely to develop the contours of state law to the same extent state courts would do absent removal. "A federal court of appeals is necessarily limited in its ability to speak to questions of state law with any certitude" and "generally must be more conservative in resolving novel issues of state law than the highest state court, since [federal courts] are limited to predicting the proper disposition based on earlier precedents developed under substantially different social and economic conditions." *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316, 356 (E.D.N.Y. 2000). Federal courts view themselves as "*Erie*-bound to apply state law as it currently exists," not to "change that law or adopt innovative theories of recovery," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992), for it is not "the function of the federal court to expand the existing scope of state law." 19 Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4507, at 207 (1996). Accordingly, "[f]ederal court is not the place to press innovative theories of state law." *Burton v. R.J. Reynolds Tobacco Co.*,

397 F.3d 906, 913 (10th Cir. 2005) (internal quotations omitted).

This dynamic is illustrated by *Insolia v. Philip Morris Inc.*, 216 F.3d 596 (7th Cir. 2000), where the plaintiffs contended that the cautious approach taken by federal courts when interpreting state law is unfair where a suit is removed to federal court over the plaintiffs' objection: "The plaintiffs say they tried to litigate this in state court, but the tobacco companies—as they generally do in cases like this—removed the case to federal court." *Id.* at 607. The Seventh Circuit recognized that "plaintiffs are in a predicament because state law in this area is stunted by the ability of tobacco companies to remove cases under diversity jurisdiction." *Ibid.* But noting that "[w]hen confronted with a state law question that could go either way, the federal courts usually choose the narrower interpretation that restricts liability," the court concluded that the plaintiffs' "bind" did not "justify the federal courts" recognizing a "new tort claim" under state law. *Ibid.*

Likewise, in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990), although the plaintiffs objected that removal of their suit would "preclude the [state] courts from ever reaching [their] question" of state law, the Fourth Circuit adhered to the rule that federal courts must not "surmise or suggest" an expansion of state law that "has not been recognized by that jurisdiction's own courts." *Id.* at 84 (internal quotations omitted); see also *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 965 (7th Cir. 2000) (observing, in case removed to federal court, that "[w]here, as in this case, we are faced with two equally plausible interpretations of state law, we generally choose the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability") (internal quotations omitted).

The Third Circuit's decision in *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (2002), provides an illustration in the context of a consumer fraud action. The plaintiffs in *Werwinski* sued Ford under Pennsylvania's Unfair Trade Practices and Consumer Protection Law on behalf of a putative class for allegedly defective transmission components. *Id.* at 663-664. Defendants removed the suit to federal court on diversity grounds. *Id.* at 664. The district court granted Ford's motion for judgment on the pleadings, and the Third Circuit affirmed.

The court of appeals recognized that the state courts had not yet decided whether the economic loss doctrine—which "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract"—applied in cases of intentional fraud under the Pennsylvania statute. *Id.* at 671, 675 (internal quotations omitted). In deciding to apply the doctrine and deny plaintiffs' claim, the Third Circuit invoked the principle that federal courts should err on the side of caution when interpreting state law: "[I]f we were torn between two competing yet sensible interpretations of Pennsylvania law * * *, we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently." *Id.* at 680.

Within months, however, Pennsylvania courts rejected the Third Circuit's holding and permitted claims for economic injuries arising from intentional violations of the same statute. See *Zwiercan v. General Motors Corp.*, 2002 WL 31053838, at *7 (Pa. Com. Pl. Sep. 11, 2002) (rejecting *Werwinski*'s "blanket application of the economic loss doctrine," and recognizing that the statute must "be liberally construed to prevent unfair or deceptive practices"); *Oppenheimer v. York Int'l*, 2002 WL 31409949, at *5 (Pa. Com. Pl. Oct. 25, 2002) (adopting "holding contrary to that of the Third Circuit on the role of the economic loss doctrine with respect to" claims under the statute); see also *Seward v. Certo*, 2006 WL 266150, at *2

(E.D. Pa. Feb. 2, 2006) (recognizing that "Pennsylvania courts * * * have expressly disagreed with *Werwinski*'s holding"). The *Werwinski* plaintiffs, forced into federal court against their wishes, thus lost on claims that have since prevailed in the state courts.*

By affording removal jurisdiction to entire industries, so long as they are subject to sufficiently thorough federal regulation, the Eighth Circuit's rule threatens to channel whole classes of state law claims to federal court. Unless this Court disapproves that rule, not only would controlling law fail to develop in these areas, but federal courts, without the benefit of state court rulings on novel claims, would tend to reject state law claims that the state courts themselves would recognize if given the chance.

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* In addition, plaintiffs often are required to satisfy the heightened standard for pleading fraud with particularity under Federal Rule of Civil Procedure 9(b) when pressing claims under state deceptive trade laws in federal court. See, *e.g.*, John R. Knight, *State Law Deceptive & Unfair Trade Practice Claims in Federal Court*, 43 DEC Fed. Law. 10, 11 (1996) ("[I]n the vast majority of reported cases on the subject, fraud-based claims brought in federal court under state deceptive or unfair trade practice statutes have been held subject to the pleading requirements of Rule 9(b)."); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1524 & n.8 (D. Kan. 1995) (holding that "allegations of deceptive trade practices under the [Kansas Consumer Protection Act] are subject to Rule 9(b)'s requirement of particularity," consistent "with other jurisdictions that have held that Rule 9(b) applies to actions under consumer protection acts similar to the KCPA") (citing cases).

C. At Best, The Eighth Circuit's Rule Permits Defendants To Force Plaintiffs Into Wasteful, Collateral Litigation.

Finally, the Eighth Circuit's expansive notion of federal officer removal has prompted defendants in several federally regulated spheres to remove state law suits to federal court. Even when removal is ultimately unsuccessful, it will make litigation substantially more time-consuming and expensive, and will deter plaintiffs from filing suit to vindicate state law rights.

The Eighth Circuit's decision has already caught on, not only among members of the tobacco industry, but in other federally regulated industries as well. See, *e.g.*, *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 850 (S.D. Ill. 2006) (window blinds); *In re Guidant Corp. Implantable Defibrillators Prods. Liability Litig.*, 428 F. Supp. 2d 1014, 1017 (D. Minn. 2006) (medical devices); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 969 (N.D. Ind. 2005) (same); see also *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (citing Eighth Circuit's decision for proposition that removal is available under §1442(a)(1) if defendant acts "pursuant to a comprehensive and detailed regulatory scheme," but holding that regulation of mortgage company and related defendants did not satisfy that standard).

The removal effort may fail, and the federal court ultimately may remand the suit to the state forum. See, *e.g.*, *Alsup*, 435 F. Supp. 2d at 853; *In re Guidant*, 428 F. Supp. 2d at 1018; *Parks*, 402 F. Supp. 2d at 971. But an eventual remand comes only after costly, time-consuming litigation in federal court over the propriety of the initial removal. The Eighth Circuit's approval of §1442(a)(1) removal based upon the FTC's purportedly "comprehensive" and "detailed" regulation of cigarette testing and advertising states a broad standard. Notwithstanding Judge

Gruender's attempts to narrow that standard in his concurrence, Pet. App. 18a-19a, defendants in numerous industries can claim to be subject to federal regulation that is at least as "comprehensive" and "detailed" as the FTC's informal regulation in this case.

With the Eighth Circuit's rule, therefore, federally regulated defendants can credibly threaten, at a minimum, to bog down state lawsuits in collateral federal proceedings. And defendants can do so with little risk to themselves. Although district courts have discretion to assess fees against the defendant who removes unsuccessfully, see 28 U.S.C. §1447(c), the Eighth Circuit's permissive standard gives many federally regulated defendants a good faith basis for attempting to remove. One district court has already relied on the Eighth Circuit's decision as grounds for refusing to award attorneys fees to plaintiffs who successfully fought removal, holding that "[t]he *Watson* case, on which Defendants relied most, gave Defendants a colorable (although ultimately unsuccessful) basis for removal." *Parks*, 402 F. Supp. 2d at 971.

At best, the threat of removal reduces a case's potential value to the plaintiff. At worst, it discourages the plaintiff from filing suit in the first place. Private plaintiffs play an important role in enforcing state consumer protection and other laws, and the threat of private suits is essential to the deterrent effect of these laws. By discouraging such suits, the Eighth Circuit's unduly broad and amorphous removal standard undercuts this deterrent effect.

* * *

The Eighth Circuit's expansive construction of §1442(a)(1) poses significant problems for the enforcement of a range of state laws, including deceptive trade acts like the one at issue here. Allowing removal of lawsuits solely because the defendants are members of industries subject to federal

regulation would deprive state courts of valuable opportunities to develop state law, and federal courts deciding state law claims invariably would reject claims untested in state court. And even if plaintiffs succeed in remanding a suit to state court, they will have spent time and money litigating over removal. The result will be to undermine the development and rigorous enforcement of state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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